Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1110

DOLPHIN FORWARDING, INC.,
Petitioner,
v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,
NEW YORK SHIPPING ASSOCIATION, INC.,

and

NATIONAL LABOR RELATIONS BOARD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CARL W. SCHWARZ
STEPHEN P. MURPHY
Metzger, Shadyac & Schwarz
One Farragut Square South
Washington, D.C. 20006
(202) 347-1631

Attorneys for Petitioner Dolphin Forwarding, Inc.

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Petitioner Dolphin Forwarding, Inc. ("Dolphin") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported and appears as Appendix A at pages 1a-74a of the Joint Appendix.[1] The decision and order of the National Labor Relations Board ("NLRB") is reported at 236 N.L.R.B. No. 42 (1978). A copy is reproduced as Appendix C (App. 99a-116a) in the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on September 25, 1979. Dolphin's petition for rehearing was denied on December 13, 1979 and a copy is reproduced in the Joint Appendix as Appendix H (App. H at p. 178a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board properly defined the work in controversy as the off-pier loading and unloading of containers and, if so, whether the ILA's attempt to acquire such work constituted a violation of Sections 8(b)(4)(B) and 8(e) of the Labor Management Relations Act.

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[1] This and the following referenced opinion is reprinted in a separately bound Joint Appendix to the Petitions of International Longshoremen's Association ("ILA") and New York Shipping Association, Inc. ("NYSA"), Docket No. 79-1035, 79-1036, filed with the Court on December 31, 1979. It is referenced herein as " a."

STATUTES INVOLVED

The relevant provisions of Sections 8(b)(4)(B) and 8(e) of the Labor Management Relations Act, 29 U.S.C. §§ 158(b)(4) and 158(e) (1976), are as follows:

> Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where an object is:
>
> * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . : *Provided*, that nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike or primary picketing; . . .
>
> Section 8(e). It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void. . . .

STATEMENT OF THE CASE

Since 1964, Dolphin has been engaged in the business of consolidating small shipments of freight, known as less-than-container loads ("LCL"), for shipment between the Port of New York and Puerto Rico. Utilizing off-pier facilities within a fifty mile radius of the Port of New York, Dolphin has subcontracted for non-ILA represented workers to load ("stuff") containers with goods which are trucked to Dolphin's facility by various shippers (App. C at p. 102a). These same workers unload ("strip") incoming containers which are trucked to Dolphin's consolidating terminal from the docks.

A shipper would employ the services of a consolidator such as Dolphin in order to reap the benefit of the special shipping rates, known as freight-all-kinds ("FAK"), available to consolidators. In addition, consolidated freight in containers has historically experienced faster transport time and greatly reduced dockside pilferage than has loose or break bulk cargo delivered directly to the piers. Use of containers has increased cargo handling productivity from 1.4 tons per man-hour up to 30 tons per man-hour (App. A at p. 5a).

Containers used by Dolphin were obtained from ocean carrier members of NYSA who freely provided space on their vessels for ocean shipment of the containers to and from Puerto Rico. These containers can accomodate nearly 17 tons of cargo and can be transported to and from the vessel as a single unit (App. A at p. 4a).

The use of containers and specially built container ships began in the mid 1950's and quickly proved

to be a boon to ocean carriers as a result of the substantially increased dockside productivity and generally reduced labor costs (App. A at p. 5a, 12a).

Longshoremen have never performed off-pier consolidation of containers (App. C at p. 103a). Their traditional work has been confined to on-pier loading and unloading of cargo which ranges in size from loose cartons to rather large boxes of goods which are picked up and delivered by trucking companies at pierside. The ILA has responded to the advent of off-pier consolidation of containers in the Port of New York by negotiating a collective bargaining agreement with the NYSA in 1959 which provided for free and unrestricted use of containers. The ILA relinquished any claim to the on-pier stripping and stuffing of containers by longshoremen and summarily closed its rolls to new membership. (App. B at p. 90a). In exchange, the ILA obtained from the NYSA and its members a "contribution" to the "royalty" fund for every container consolidated by non-ILA labor at off-pier facilities.

The issue of containerization lay dormant until 1967[2] when the ILA resolved that *all* containers passing through the Port of New York should be stripped or stuffed by ILA labor. After a lengthy strike, a collective bargaining agreement was reached in February of 1969 by which the ILA abdicated its claims to all but less than 20% of the

[2] In 1966, the ILA had been able to coerce the NYSA into guaranteeing payment to each longshoreman for at least 1,600 hours of work per year. This was increased in 1968 to 2,080 hours per longshoreman. These payments were in addition to any royalty fund "contributions" made by the ocean carriers.

container business. Moreover, the ILA allowed off-pier consolidating to continue if the steamship lines were willing to pay liquidated damages of $250 per container to the ILA Container Royalty Fund (App. A at p. 9a). This agreement, known as the Rules on Containers, applied solely to containers which had been stripped or stuffed at off-pier facilities within a fifty-mile radius of the port (App. A at p. 15a). Since a significant amount of LCL work was done within such a radius, the Rules on Containers presented a real and present danger to the continued existence of consolidators such as Dolphin.

For a period of time, however, the Rules were not strictly enforced. It was not until January of 1973 that an addendum to the Rules, known as the "Dublin Supplement," was extracted by the ILA from the NYSA which required strict enforcement of the Rules. Thereafter, the fine for failure to comply with the Rules was increased to $1000 per container which was payable to the ILA Container Royalty Fund (App. A at p. 67a). The Dublin Supplement required that ocean carrier members of the NYSA cease providing containers to consolidators in violation of the Rules. In addition, the Rules were amended to include a "runaway shop" clause which provided for extensions of the fifty-mile radius if a consolidator sought to evade the Rules by utilizing facilities beyond the fifty-mile radius (App. A at p. 66a).

From August 24, 1974 until at least January 23, 1975, the ocean carriers who carried the bulk of the New York to Puerto Rico trade were fined $47,000 for providing containers to Dolphin and to another consolidator doing business in the Port of New York

(App. A at pp. 21a-22a). As a result, Dolphin was subsequently precluded from continued use of their containers and was denied access to vessel space (App. A at p. 22a; App. C at p. 103a). This circumstance forced Dolphin and the other consolidator affected to ship their freight through the non-ILA Port of Jacksonville at a substantially increased cost (App. C at p. 103a).

In the face of economic extinction, Dolphin filed unfair labor practice charges with the NLRB in May of 1975. These charges were virtually identical to those filed by two of Dolphin's chief competitors in the Port of New York, Consolidated Express, Inc. ("Conex") and Twin Express, Inc. ("Twin"), which had resulted in the issuance of cease and desist orders by the NLRB enjoining enforcement of the Rules against the charging parties. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956 (1975), *enf'd*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) ("*Conex*")[3]. This order was enforced by the United States Court of Appeals for the Second Circuit in *International Longshoremen's Association* v. *N.L.R.B.*, 537 F.2d 706

[3] The National Labor Relations Board filed a motion for preliminary injunction, pursuant to § 10(1) of the Labor Management Relations Act, 29 U.S.C. § 160(1), enjoining enforcement of the Rules as against Dolphin. *Danielson* v. *International Longshoremen's Association*, No. 75-Civ.-4027 (S.D.N.Y. filed Sept. 18, 1975). The proceeding was stayed pending final determination by the Board of the *Conex* proceeding. *Id.*

(2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *rehearing denied*, 430 U.S. 911 (1977).[4]

On May 30, 1978, the NLRB issued a cease and desist order in Dolphin's favor (App. C at pp. 99a-116a). The Board premised its decision on the *Conex* case which it found controlling as a result of identity of the parties and of the work in question. This order was appealed by the ILA and NYSA to the United States Court of Appeals for the District of Columbia Circuit. As Conex and Twin had done before it,[5] Dolphin filed a private antitrust action charging a group boycott in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, in conjunction with a claim for damages pursuant to § 303 of the Labor Management Relations Act, 29 U.S.C. § 187. *Dolphin Forwarding, Inc.* v. *New York Shipping Association, Inc.*, No. 79-276 (D.N.J. filed Jan. 22, 1979).

On September 25, 1979, the Court of Appeals vacated the NLRB order and denied the NLRB cross-application for enforcement of the cease and desist order (App. A at pp. 1a-74a). The Court did not dispute the NLRB's findings of fact; reversal was

[4] One significant impact of the invalidation of the Rules is that the ILA was forced in 1978 to reopen its membership roles, closed since 1959, to admit 750 new longshoremen. *See Agreement No. 10294*, Dec. Fed. Mar. Comm'n No. 77-23 at 46-47 (December 13, 1979). In his decision, Administrative Law Judge Kline described a number of alternatives for increasing usage of ILA longshoremen short of group boycotts of consolidators. *Id.* at 90.

[5] *Consolidated Express, Inc.* v. *New York Shipping Association, Inc.*, 452 F. Supp. 1024 (D.N.J. 1977), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979), *petition for cert. filed*, 49 U.S.L.W. 3001 (June 22, 1979) (Nos. 78-1902 and 78-1905).

based upon a misapplication of the doctrine of work preservation as enunciated in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612 (1967) and *N.L.R.B.* v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507 (1977). Judge Robb, in dissent, found that there was substantial evidence in the administrative record to support the decision of the Board and rejected any "similarities" between loading ships and loading containers (App. A at pp. 73a-74a).

REASONS FOR GRANTING THE WRIT

As both the majority and dissenting opinions of the Court of Appeals specifically recognized, the decision below that the Rules on Containers operate to "preserve" rather than "acquire" work for the longshoremen is in direct conflict with the rulings of three other Circuit Courts of Appeal. *International Longshoremen's Association Local 1575* v. *N.L.R.B.*, 560 F.2d 439 (1st Cir. 1977); *Humphrey* v. *International Longshoremen's Association*, 548 F.2d 494 (4th Cir. 1977); *International Longshoremen's Association* v. *N.L.R.B.*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *rehearing denied*, 430 U.S. 911 (1977). The decision is, of course, in conflict with the long-held position of the National Labor Relations Board which continues to enforce the Labor Act in a manner consistent with that established position despite the Court of Appeals' ruling. *See International Longshoremen's Association Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (September 28, 1979), *appeal docketed*, No. 79-3444 (5th Cir. Oct. 16, 1979); *International*

Longshoremen's Association (Beck Arabia, Ltd.), 245 N.L.R.B. No. 172 (September 28, 1979), *appeal docketed*, No. 79-1672 (4th Cir. Oct. 16, 1979).[6] Indeed, the decision of the Court of Appeals is inconsistent with a prior *per curiam* ruling by another panel of the Court below. *See International Longshoremen's & Warehousemen's Union, Local 13* v. *N.L.R.B.*, 169 U.S. App. D.C. 300, 515 F.2d 1017 (1975), *cert. denied*, 424 U.S. 942 (1976) ("California Cartage").

The impact of such inconsistent rulings in the marketplace borders on the catastrophic. The ILA is now free to enforce the Rules on Containers against some competitors in the business of off-pier consolidating of goods for shipment but not against others, such as Conex and Twin, the two firms who were the complaining parties in the Second Circuit case of *International Longshoremen's Association* v. *N.L.R.B.*, 537 F.2d 706 2d Cir. 1976), *cert. denied*, 429 U.S. 1041, *rehearing denied*, 430 U.S. 911 (1977). The decision in the instant case creates such a competitive imbalance in the Port of New York area, where Conex, Twin and Dolphin are direct competitors, that a "duopoly" is the likely result, *by operation of law*, if the Court of Appeals' decision stands. Even the possibility of the creation of this situation will have a serious and detrimental impact upon the business of Dolphin and, indeed, all but Conex and Twin.

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[6] In that case, the National Labor Relations Board distinguished the unloading of a container (as "part" of a ship) *at the pier* with unloading a container (as "part" of a truck) *off the pier* which the Board found to be historically performed by the Teamsters Union. The Board found nothing in *Northeast Marine Terminal Co., Inc.* v. *Caputo*, 432 U.S. 249 (1977) which related to off-pier activities, contrary to the majority view in the case below. (Slip op. at 42-43).

These considerations as well as the oft-cited need for uniform application of the labor laws, *see, e.g., Garner* v. *Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U.S. 485 (1953), are forceful evidence in support of a prompt and final resolution of the issues raised in the opinion below.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARL W. SCHWARZ
STEPHEN P. MURPHY
Metzger, Shadyac & Schwarz
One Farragut Square South
Washington, D.C. 20006

Attorneys for Petitioner Dolphin Forwarding, Inc.

see 5
963
7008
HHHH